



IT IS ORDERED as set forth below:

Date: January 28, 2010

James E. Massey

**James E. Massey
U.S. Bankruptcy Court Judge**

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:

CASE NO. 09-82889

Teron Trace, LLC,

CHAPTER 11

Debtor.

JUDGE MASSEY

MAJ Investors I, LLC,

Movant,

v.

CONTESTED MATTER

Teron Trace, LLC,

Respondent.

ORDER GRANTING MOTION FOR RELIEF FROM STAY

Teron Trace, LLC, the Debtor in this Chapter 11 case, owns a commercial office building having rentable space of approximately 28,000 square feet located at 2078 Teron Trace, Dacula, Georgia (the "Property"). The Property secures a note with an outstanding principal balance of approximately \$5,459,000 presently owned by Movant MAJ Investors I, LLC. Movant acquired

the note and a security deed on the Property from the Federal Deposit Insurance Corporation, which took over the original lender, Haven Trust Company, in December 2008. Debtor filed this case on August 31, 2009.

On October 30, 2009, Movant filed its motion seeking stay relief pursuant to 11 U.S.C. § 362(d)(2), which provides:

On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay – . . .

(2) with respect to a stay of an act against property under subsection (a) of this section, if –

- (A) the debtor does not have an equity in such property; and
- (B) such property is not necessary to an effective reorganization[.]

The Court conducted an evidentiary hearing on the motion on January 15, 2010.

On December 31, 2009, Debtor filed a plan of reorganization that classifies Movant's claim as secured in the amount of \$5,000,000 (Doc. No. 62, p. 10) and unsecured for the balance (*Id.*, p. 11). It is undisputed that there is no equity in the Property.

The issue presented by the motion is whether the Property is “necessary for an effective reorganization.” The burden of proof on this issue is on Debtor. 11 U.S.C. § 362(g)(2).

Debtor's owner, Lindsey Warren, testified extensively about what might be described as a “perfect storm” surrounding the loan. The note had a maturity date of December 15, 2007, which was extended at least once to a date in 2008. Mr. Warren testified about conversations he had with the lender and the FDIC about extending the maturity date to 2010, but Debtor was unable to obtain a written agreement to that effect from either Haven Trust or the FDIC. Although Debtor contends that it is not in default under the note, the issue presented by the motion for stay relief

does not turn on whether Debtor is in default. Nor is Debtor's contention that Movant agreed to a workout relevant to the issue presented.

In order to prevail on the motion, Debtor had to prove

not merely . . . that if there is conceivably to be an effective reorganization, this property will be needed for it[,] but that the property is essential for an effective reorganization *that is in prospect*. This means, as many lower courts, including the en banc court in this case, have properly said, that there must be "a reasonable possibility of a successful reorganization within a reasonable time." 808 F.2d, at 370-371, and nn. 12-13, and cases cited therein.

United Sav. Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 375-376, 108 S.Ct. 626, 632-633 (1988).

As Movant points out, Debtor's projections showing that it can generate sufficient net income to fund a confirmable plan of reorganization are speculative. Debtor has but three tenants, only one of which is presently paying rent. Its only paying tenant is Gwinnett Hospital System, Inc., which leases approximately 8,900 square feet; the monthly rental of approximately \$17,000 is being paid to Movant.

After two other tenants went out of business in 2007, Mr. Warren and another individual formed Gibraltar Executive Suites, LLC ("GES") in 2008. As its name states, GES is in the business of renting office suites, an endeavor in which Mr. Warren and his colleague had no experience. In addition to office space, it supplies furniture to clients and provides them with services, such as use of conference rooms, use of copy machines, lobby reception, mail handling, telephones, etc.

In May 2008, GES and Debtor executed a lease for approximately 12,000 square feet on the second floor of the Property. The initial rent payment was due December 1, 2008. Debtor contends that it and GES modified the lease orally to extend the period of free rent though

June 30, 2010. In December 2009, GES and Debtor entered into a second lease for approximately 4,255 square feet on the first floor of the Property; that lease provides for free rent until January 2011.

Mr. Warren testified concerning pro forma income statements for Debtor (Debtor's Exhibit 3) that project rents from GES totaling \$152,397 in the 12-month period ending March 31, 2011 and \$248,582 for the 12-month period ending March 31, 2012. Exhibit 3 also projects common area expenses and operating expenses for the same periods. Debtor provided no credible evidence to support any of those projections, either on the income side or on the expense side.

Until the last quarter of 2009, GES had never rented more than 14 of its suites. Although Debtor's Exhibit 13 shows that GES rented seven additional suites (at least three to an existing client) during the last quarter of 2009, the average income per office dropped significantly, indicating that GES made significant concessions on rent.

According to Debtor's Exhibit 13, GES had contracts for 20 suites at the end of 2009, but six suites under contract in 2009 became vacant during the year. Hence, 23% of the suites under contract in 2009 became vacant in that year. It can be presumed from Debtor's Exhibit 13 that GES will continue to lose some of its clients. On Debtor's Exhibit 3, it projects a vacancy rate of only 6.35%, beginning in April 2011. With respect to the 20 suites presently occupied, GES received average income of \$727.70 per suite per month, which is only 86% of it projected average rate of \$847.85 as shown on Exhibit 13. To achieve an occupancy rate of 94%, GES would have to obtain contracts for most of the presently unoccupied suites plus replacement contracts for suites that become vacant. To meet its income goals to enable it to pay its rent obligations to Debtor, GES would have to increase its average monthly rental rate from \$728 to

\$848, which would require significantly higher rental rates for new and replacement clients.

There is no credible evidence to show how GES could manage to achieve its projections.

Debtor called Ms. Susan Cauthen as an expert witness with regard to the leasing of executive suites. She began providing consulting services to GES in August or September of 2007 because GES's principals had no experience operating a suites business.

Ms. Cauthen testified that to attract a new client in a "normal" economy, a suites business would have to agree to abate rent entirely for the first 12 months and to abate half the rent during the next six months and 25% of the rent during the following six months. She stated that the present economy is not a "normal" economic environment. When asked why give free rent, she stated that it was "standard." Based on Ms. Cauthen's testimony, GES would not likely be able to lease the remaining unused suites even in a "normal" economy without offering free rent for 15 months.

When asked whether she would be surprised if took 18 months for a suites business to become profitable, Ms. Cauthen said she would not be and then added that she was working for a client that took over a suites business in Buckhead and stated that "in 20 years I have never negotiated rates as low as I have negotiated [currently]." The testimony of Debtor's own expert witness completely undermines the assumptions made in Debtor's Exhibits 3 and 13.

Debtor offered no evidence concerning the market for executive suites in the vicinity of the Property or the market rates in that area for suites of the type GES seeks to rent. Ms. Cauthen was never asked how long it would take GES to lease its unoccupied suites. Debtor offered no testimony concerning the lengths of the office services agreements pursuant to which GES presently rents suites (with two exceptions) or concerning the financial strength of its clients.

Debtor offered no evidence to show how much it would cost GES to provide services to existing and future clients. It provided no evidence to show what marketing plan GES has, if any, and the probability that GES could successfully execute any such plan. It provided no evidence to show how it determined the present and future costs of operating the Property. The lack of any evidence on these issues likewise undermines entirely the assumptions on which Debtor's plan of reorganization ultimately rests.

Debtor refers to its plan of reorganization as its "first plan," as if that excuses its burden of showing that it is reasonable to expect that a plan can be confirmed. The plan, as filed, is not confirmable. It improperly proposes to pay Movant nothing on a deficiency claim that exceeds Debtor's other unsecured debt, which it proposes to pay in full. Debtor defends its treatment of Movant's deficiency claim on the ground that Mr. Warren guaranteed it, but it produced no evidence that Mr. Warren was capable of paying any portion of that claim. Similarly, the plan provides that Mr. Warren would retain his ownership of Debtor, which he cannot do under 11 U.S.C. § 1129(b) without making a substantial capital infusion into Debtor. There is no evidence that he is capable of doing so.

Debtor did not have to prove feasibility of a plan to prevail, *In re 266 Washington Associates*, 141 B.R. 275, 281 (Bankr. E.D.N.Y. 1992), but at a minimum it had to show facts that would enable the Court to assess the probability that a plan could be confirmed - that an effective reorganization is "in prospect." Debtor has not provided sufficient proof of the probability that GES can lease suites and generate the necessary income that is "required to make any reliable assessment of the financial feasibility of any plan." *Pegasus Agency, Inc., v. Grammatikakis (In re Pegasus Agency, Inc.)*, 101 F.3d 882, 887 (2d Cir. 1996) (quoting *In re Pegasus Agency, Inc.*, 186

B.R. 597, 603 (Bankr. S.D.N.Y. 1995)). Nor has it provided any proof to suggest that Mr. Warren's personal financial condition would enable him to invest any funds in the Debtor or to pay Movant's deficiency claim as its plan assumes.

For these reasons, Movant's motion for relief from the automatic stay to enable it to foreclose on the Property, record a deed under power and take possession of the Property pursuant to state law is GRANTED.

END OF ORDER